REMARKS

This Amendment is submitted further to the Notice of Appeal filed March 3, 2009, and in response to the Final Office Action dated September 4, 2008. A Request for Continued Examination (RCE) and Petition for Extension of Time (5 months) is submitted herewith.

Claims 1-10 and 12- 66 are currently pending. Independent claim 1, 17, 32, 46-48 and 50 have been amended to further highlight distinguishing features and incorporate subject matter from dependent claims 3, 12, and 13 and other similar dependent claims. Other amendments have been made for readability and to reflect that the computer readable medium is a storage medium. Claims 3, 12, 13, 26-28, 40-42, and 49 have been canceled without prejudice or disclaimer. Claim 67 is newly added. Support for the amendments to the independent claims may be found at least at Figure 7a and paragraphs 0059-0061 of the published application, for example.

Art Rejections

Claims 1-3, 5-17, and 19-58 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Appln. Pub. No. 2002/0095228 ("Corts") in view of USP 5,978,381 ("Perlman"), and further in view of USP 6,529,949 ("Getsin"). Claims 4 and 18 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Corts in view of Perlman and Getsin, and further in view of USP 6,266,774 ("Sampath"). Claim 59-66 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Corts in view of Perlman and Getsin, and further in view of Official Notice. Independent claim 1, 17, 32 and 46-50 have been amended to further recite distinguishing features, and Applicant respectfully submits that claims 1-10 and 12-66 are patentable over the applied references.

Claim 1 as amended recites a system for dynamic scheduling of broadcast digital data content to client devices of users, said digital data content available from one or more sources, and said scheduling based on type of data and activity of said system. Claim 1 has been amended to recite, among other things, that data content of both the first data type and the second data type are processed for digital radio broadcast transmission with deactivate flags appended thereto, and that a disable deactivate flag is processed for digital radio broadcast transmission, wherein the disable deactivate flag instructs the client devices to activate the data content of the first and second data types and render the data content of the

first and second data types in synchronization with the real-time rendering of a digital radio broadcast signal. The claim amendments reflect the inclusion of distinguishing subject matter from claims 3, 12 and 13 and additional distinguishing subject supported by the specification at least at Figure 7a and paragraphs 00659-0061.

In contrast, even if hypothetically combined as suggested by the Office, the applied references would not yield the combination of features recited in claim 1. First, Applicants submit that the combination of references would not yield a system in which both first and second data types are processed for digital radio broadcast with deactivate flags appended thereto. In this regard, the Office's rejections of claim 12 and 13 are understood to only address the deactivation of content of one type, as was previously recited in independent claim 1 in the prior Amendment, not deactivation of content of both first and second data types. Applicants see no disclosure in Perlman, the reference relied upon for alleged deactivation and activation of data content, of processing data content of first and second data types for digital radio broadcast so as to both be activated and both be rendered in synchronization with one another and with a real-time digital radio broadcast transmission. The rejection should be withdrawn for at least these reasons.

Second, claim 1 as amended clearly overcomes the Office's inherency argument with regard to the recombination of data and the broadcast of a deactivate flag, for which the Office relies upon Perlman. Office Action at p. 4 ("recombining the first and second content at the client device (inherent to form the complete content)"). The Office similarly relies upon inherency to reject the subject matter of claims 12, and 13. Office Action at p. 6 ("It is apparent that an activation flag would be send after the client pay to activate the content for viewing.") As the Office is aware, and as noted at MPEP § 2112, "In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art" *Ex Parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App & Inter. 1990) (Emphasis original.) "Inherency, however, may not be established by probabilities and possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.'" *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999) (citations omitted).

It would not be inherent – i.e., a necessity as opposed to a mere possibility – to transmit a "disable deactivate flag" over digital radio broadcast transmission, when both

Perlman's disclosure and Corts's disclosure are contrary to such an assertion. In rejecting claims 12 and 13 (subject matter from which is now recited in claim 1), the Office relies upon a purchase embodiment of Perlman described at col. 13, lines 14-24. The Office alleges that Perlman inherently discloses that content is broadcast with a deactivate flag so that it is stored and not available for immediate use, and that an activation flag would be sent after the client pays to activate the content for viewing. Office Action at p. 6. Applicants note that Perlman purports to carry out such tasks over a two-way communication channel of a network such as the Internet. Perlman at col. 2, lines 50-62. There is no disclosure in Perlman of transmitting such information over digital radio broadcast, much less a suggestion that such a flag must necessarily be used or that, if used, it must necessarily be transmitted over a digital radio broadcast.

Corts also discloses a purchase embodiment. Indeed Corts explicitly states at paragraphs 0027 and 0384 that consumers respond to advertisements to purchase goods and services via a non-IBOC return path, which depends upon the communication capabilities of the receiver, and may include communication over the Internet or some other wide area network communications mode. In other words, even where Corts discloses a digital radio broadcast system, any response from the user is communicated via some communication link other than the digital radio broadcast transmission to which the user is responding. Any response by the system could, in turn, be transmitted back to the user via a non-IBOC path as opposed to a digital radio broadcast transmission.

Assuming, for the sake of argument, an attempt to create the Office's hypothetically modified system, there is no way to conclude from the disclosures of Corts and Perlman that one skilled in the art necessarily would use a digital radio broadcast to transmit a disable deactivate flag. Corts responds to a purchase request over a non-IBOC return path, i.e., not over digital radio broadcast. Even if the Office's hypothetical combination were made, there is no evidence to suggest transmitting a disable deactivate flag over digital radio broadcast transmission. It is much more likely, in view of the disclosure of Corts and Perlman, that such a disable deactivate flag, if any, would be sent via the non-IBOC path to which a particular receiver is connected. If anything, that would permit a more immediate response and would avoid transmitting the disable deactivate flag to all radio receivers that are tuned in, instead of to just the particular radio receiver for which the activated content is intended.

Thus, as described above, there is no credible evidence to establish that any alleged recombination of data content of multiple data types in the Office's hypothetical system based on the purported inherent operation of Perlman would necessarily occur in the manner claimed. The rejection should be withdrawn for at least this additional reason.

The rejection should be withdrawn for the additional reason that the applied references fail to teach transmitting a disable deactivate flag via digital radio broadcast transmission, wherein said disable deactivate flag instructs said client devices to activate the data content of the first data type and the data content of the second data type and render the data content of the first and second data types in synchronization with the real-time rendering of a digital radio broadcast transmission. In rejecting claim 1, the Office relies on Getsin as teaching "delivering a first type of content...but preventing the user from accessing the content until after supplemental information is received and a scheduled time has arrived.... Getsin further discloses that the enabling and disabling of the content occurs without user instructions." Office Action, p. 4. Getsin does not disclose that, once the content has been enabled, it should be rendered in synchronization with the real-time rendering of a digital radio broadcast transmission, as now required by claim 1 as amended. Nor does the combination of Corts in view of Perlman and Getsin address this deficiency because the combination does not suggest that any stored content should be rendered in synchronization with the real-time rendering of a digital radio broadcast transmission.

Independent claims 17, 32, 46-48, 50 and 67 recite subject matter that is distinguishable over the applied references at least for reasons similar to those described above in connection with claim 1. It is respectfully submitted that independent claims 1, 17, 32, 46-48, 50 and 67 are patentable over the applied references, and withdrawal of the rejections and allowance of the claims are respectfully requested.

The remaining dependent claims are allowable at least by virtue of their dependency, and withdrawal of the rejections and allowance of the dependent claims are respectfully requested.

New Claim

New independent claim 67 has been added to round out the scope of the protection sought, support for which may be found in the original independent claims and in paragraphs 0059-0061 and FIG. 7a of the published application, for example. Claim 67 recites, among

other things, that the gateway processes the data content of the second data type for digital radio broadcast transmission to the client devices and for rendering the data content of the second data type in real-time at the client devices. In other words, in claim 67, the data content of the second data type is not pre-downloaded and deactivated. Claim 67 also recites that the gateway processes a disable deactivate flag for digital radio broadcast transmission to the client devices, wherein said disable deactivate flag instructs said client devices to activate the data content of the first data type and render the data content of the first data type in synchronization with real-time rendering of the data content of the second data type. As such, claim 67 is allowable at least because the combination of applied references fails to teach activating data content of the first data type and rendering the data content of the first data type in synchronization with real-time rendering of other data content of another type, as discussed above in connection with claim 1. Allowance of claim 67 is respectfully requested for at least these reasons.

Conclusion

In light of the above amendments and remarks, the Applicant respectfully requests that the Examiner reconsider this application with a view towards allowance. The Examiner is urged to call the undersigned to resolve any issues that may remain.

The Commissioner is hereby authorized to charge any required fee(s) to Jones Day Deposit Account No. 50-3013 to maintain the pendency of this application.

Respectfully submitted,

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